

No. 86-1447

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

RAYMOND R. TORRES, PETITIONER

v.

SECRETARY OF THE NAVY

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

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Petitioner contends that the court of appeals erred in affirming the district court's dismissal of his Title VII suit on the ground that there was no evidence of employment discrimination or reprisal actions by his employer, the Department of the Navy.

1. Petitioner, who is of Hispanic origin, was employed as a civilian personnel officer at the Miramar Naval Air Station in San Diego (Pet. App. A5-A6). Petitioner filed several Title VII actions against the Navy alleging employment discrimination based on national origin, and retaliatory conduct by the Navy (*id.* at A4). The actions were consolidated for trial (*ibid.*).

Petitioner based his discrimination and reprisal claims on the Navy's decisions 1) to select in June 1976 someone other than petitioner to be the civilian personnel director in Rota, Spain; 2) to transfer in 1977 the personnel unit, including

petitioner, from Miramar to the Naval Air Station at North Island; 3) to withdraw in 1977 petitioner's name as the person tentatively selected to become the civilian personnel director for the Marine Corps in Iwakuni, Japan; and 4) to remove petitioner from his Miramar position in January 1980, which action was subsequently reversed by the MSPB (Pet. App. A6).

After a trial before the court lasting 23 1/2 days, the district court granted the Navy's motion for dismissal at the close of plaintiff's case, under Fed. R. Civ. P. 41(b) (Pet. App. A35). With respect to all the claims of discrimination, the district court found that petitioner "failed to carry his initial *prima facie* burden of showing that some discriminatory criterion was the likely reason for the denial of a job opportunity," and that "[petitioner's] presentation established the non-pretextual legitimate business reasons for the actions which were taken" (*id.* A26). The district court discussed each instance in some detail.

As to the selection of someone else to be the personnel director in Rota, Spain, the court found that there was no evidence of discrimination (Pet. App. A9). Regarding the Navy's decision to transfer the Miramar personnel unit to North Island, the court concluded that the transfer was "not motivated by discrimination, but rather was a legitimate business decision * * *" (*id.* at A14). The court found it "impossible * * * to detect any attempt by any Navy official involved in the transfer of function decision to discriminate or retaliate against the [petitioner] * * *" (*id.* at A15). The district court further determined that the Navy's decision to withdraw its tentative selection of petitioner to be the civilian personnel director in Iwakuni, Japan, was not based on petitioner's "national origin, or any motive for reprisal" (*id.* at A18). Rather, petitioner's name was withdrawn after Marine Corps officials were alerted by Navy officials of petitioner's professional deficiencies. As for the

Navy's unsuccessful attempt to discharge petitioner, the court found that petitioner had not presented "sufficient evidence to prove that the attempted removal was motivated by discrimination or reprisal" (*id.* at A20).

The district court also found that petitioner had failed to establish a disparate impact case (Pet. App. A26-A29), that his claims of wrongful denial of affirmative action relief were meritless (*id.* at A29-A31), and that there was no probative evidence to support petitioner's claims of reprisal (*id.* at A31).

The trial court's decision was affirmed in an unpublished memorandum opinion. The court of appeals held that the lower court's findings were supported by "substantial evidence" (Pet. App. A41). The court also ruled that the district court's award of costs to the Navy was not an abuse of discretion (*id.* at A42).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is not warranted.

a. Petitioner raises no objection to the lower courts' decisions on his claims of national origin discrimination. He does, however, claim that the district court improperly disposed of his charges of retaliation. Petitioner appears to argue (1) that the district court did not delve far enough into the retaliation issue, (2) that the district court erroneously found that retaliation is actionable only if it is racially motivated, and (3) that an unduly stringent evidentiary standard was applied. None of these arguments is correct.

First, the district court gave adequate, independent treatment to the question of retaliation. The district court was explicit in its findings of no retaliation, Pet. App. A15 (transfer of function to North Island); *id.* at A18 (withdrawal of tentative selection at Iwakuni); *id.* at A20 (attempted

removal from federal employment); *id.* at A31. If petitioner is arguing that the district court's consideration of the issue was insufficient, he is incorrect.

Petitioner is also incorrect if he contends that the district court, in granting respondent's Rule 41(b) motion, denied him an opportunity to "question, in detail the 'legitimacy' of the Defendant's actions" (Pet. 9). The district court heard only petitioner's case-in-chief. It would have been difficult for the district court to afford petitioner an opportunity to question respondent's affirmative reply to his case, since no such reply was made. Rather, the court carefully sifted all the circumstances surrounding respondent's decisions as presented by petitioner's case, including the explanations offered when those decisions were made, and could find no evidence "that the plaintiff was the victim of discrimination or reprisal" (Pet. App. A23). Petitioner's argument appears to reduce to the claim that respondent should have been required to present evidence despite the availability of Rule 41(b).

Petitioner's suggestions that the district court held that retaliation must be racially motivated to be actionable and applied an unduly stringent evidentiary standard (Pet. 10), are both incorrect. The district court understood that retaliation is separate from race discrimination, and found that "no probative evidence has been presented to establish that the challenged personnel actions were motivated by a desire to discriminate *or retaliate*" (Pet. App. A31 (emphasis added)). At no point did the district court suggest that it was deviating from the universally-understood standard of preponderance of the evidence.

b. Petitioner argues (Pet. 14-20) that the Navy's alleged failure to give him preferential treatment under its affirmative action program violates Title VII. Petitioner's argument is meritless. As the district court correctly points out,

this Court has previously determined that Title VII does not "require preferential treatment be afforded to any employee based upon his or her minority status, even though such action may be permitted under a policy of affirmative action, under certain limited circumstances" (Pet. App. A30). See *Steelworkers v. Weber*, 443 U.S. 193, 205-206 (1979); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).¹

c. As a final matter, petitioner asserts that the district court failed to "address" the "allegations of statutory and regulatory violations which were offered as relevant indicia to the establishment of a prima facie case of discrimination/retaliation" (Pet. 21). Petitioner presented several claimed violations of regulations and statutes other than Title VII as evidence of improper purpose on respondent's part; the district court fully evaluated these claims. To the extent the alleged "statutory and regulatory" violations concern the Navy's failed attempt at removal (see Pet. 3-4), the district court correctly concluded that the merits of that decision were not an issue before the court and that it was not an attempt to discriminate or retaliate (Pet. App. A20). In so far as petitioner is referring to the Navy's handling of his "short-form" and "long-form" complaints, the district court found no evidence that the Navy's procedural problems with the complaints had any "direct relationship" to the personnel actions that formed the basis of petitioner's Title VII case (*id.* at A22). In general, the district court's painstaking analysis of the evidence belies any suggestion that it ignored any possible indicia of discriminatory or retaliatory purpose.

¹Petitioner's reliance (Pet. 14-20) on *Johnson v. Transportation Agency*, No. 85-1129 (Mar. 25, 1987), is misplaced. There is no suggestion in *Johnson* that a non-discriminatory employment decision that is not based on an affirmative action plan can violate Title VII.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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